NG BAK SOON & ORS v. JI SENG HONG PLASTIC MANUFACTURING SDN BHD; MUSTAPHA MOHAMED (RECEIVER & MANAGER AND APPLICANT)

HIGH COURT MALAYA, IPOH
CHE MOHD RUZIMA GHAZALI JC
[COMPANIES (WINDING-UP) NO: 28-46-2005]
19 MAY 2014

COMPANY LAW: *Receivership – Winding up, effect of – Application by receiver and manager to intervene in winding-up proceeding – Whether winding-up order granted before appointment of receiver and manager – Whether application intended to interfere with winding-up order – Whether receiver and manager should be allowed to intervene in winding-up proceeding*

COMPANY LAW: *Receivership – Sale of company's assets by receiver and manager – Whether bona fide – Whether validation order should be granted – Companies Act 1965, s. 223*

The applicant, as the receiver and manager ('R&M') of the respondent, had made the application for, *inter alia*, leave to intervene and to be made a party to the petitioners' petition for winding-up of the respondent as well as validation order for a series of sale and purchase and assignment agreements that were executed by the applicant in his capacity as the R&M. The petition for winding-up of the respondent was originally filed by the petitioners in 2005 and a winding-up order was duly granted in 2012. However, the respondent had successfully obtained a stay of execution of the winding-up order pending its appeal to the Court of Appeal. The applicant, meanwhile was appointed by Hong Leong Bank Bhd (formerly known as Oriental Bank Bhd) ('HLBB') as the R&M of the respondent *vide* a deed of appointment in 2013 pursuant to debentures granted to HLBB by the respondent in exchange of financing facilities. The debentures contained an irrevocable power of attorney clause where the applicant's appointment as R&M would also entail his appointment as the lawful attorney for the respondent for valuable consideration. The petitioners raised a preliminary objection to the application to intervene on the ground that the applicant was too late to intervene when the winding-up order was duly granted in 2012. The petitioners also objected to the applicant's application for the validation order on the grounds, *inter alia*, (i) that the applicant had knowledge of the winding-up proceedings and yet failed to inform the petitioners and the respondent's liquidator of the sale of the respondent's assets; (ii) the bulk of the assets or properties were being sold to a company with common directors of the respondent; and (iii) the transaction in the present case was not a truly independent bargain and did not reflect the true market value of the respondent's assets. The applicant on the other hand argued that since the crux of the petitioners' challenge to the sale was as to whether or not it was

bona fide, the petitioners would be entitled under the relevant provisions of the Companies Act 1965 ('the Act') to seek recourse against the applicant upon completion of the sale and its current action in opposing to the application was premature and should not be entertained. The applicant also argued that the sale of the respondent's assets were *bona fide* and the petitioners' allegations and dispute against the valuation report was defective as they did not discharge their burden of proof thereof.

Held (allowing application):

(1) The applicant's application to intervene was not intended to interfere with the winding-up order but to apply for a validation order under s. 223 of the Act. Even though there was no longer a winding-up proceeding before the court, the applicant could still use the existing files to apply for the validation order to dispose of the respondent's assets since it was related to the winding-up order. It was proper for the applicant to apply for leave to intervene in the existing winding-up proceedings. (paras 18 & 19)

(2) It was clear that even though the applicant as R&M lost his status as an agent of the respondent when the respondent was wound up, he continued to retain his possessory powers as conferred upon him by the debenture to take custody and control of all the respondent's assets charged under the debenture. The clear demarcation of powers and duties between the applicant under the debenture and the liquidator under the law enabled the applicant to exercise his separate powers to deal with the respondent's assets. Therefore, the applicant's dealings in disposing of the assets to the highest bidder for each and every asset offered through public tender was well within the scope of the applicant's powers and duties and was validly done. (para 42)

(3) All the steps taken by the applicant, *ie* the effort of getting the valuation report; preparing of information memorandum; placing an order for sale advertisement in the newspaper; accepting the highest bid for various assets and signing the sale and purchase agreements with the condition precedent that the transactions be validated through a court obtained validation order showed that the applicant had acted in good faith and had done what was supposed to be done by a prudent R&M while dealing with the charged assets. (para 43)

(4) The petitioners, while alleging and disputing the valuation report, had not discharged their burden of proof thereof by producing another evidence of valuation to counter the value given by the applicant. There are various methods of valuation and what was tendered in the court by the applicant was one of them. The court could not say that it was defective unless it could be shown that the method used was totally wrong and against the basic principles of valuation. The opinion given

by a valuer as regards to the valuation of the assets was merely a guide to the applicant and the valuation given did not bind the applicant since the sale was put up in the open market. (paras 44-46)

(5) It was never alleged nor proven that there had been any private dealing between the applicant and CAM Plastic Industries Sdn Bhd or any of its directors. The sale of the respondent's assets was done by the applicant, who was an R&M and not by the directors of the respondent. Therefore, the element of conflict of interest, improper bargain or bad faith, as alleged, had never arisen. Those dealings done by the applicant were truly independent. (para 49)

(6) The applicant's failure to inform the liquidator as to the dealings was not fatal and could not fully nullify those dealings. While as a matter of practice, the applicant could have informed the liquidator prior to the dealings, there was no legal requirement for the applicant to do so. (para 50)

(7) Any attempts to delay the validation order to validate the dealings of the respondent's assets would not only deny the benefit to the general body of creditors, but also cause interest to accumulate and was detrimental to the respondent. Therefore, it was prudent and imperative that the sale be concluded soonest possible. (para 52)

Case(s) referred to:

Australian & New Zealand Banking Group Ltd v. Bangadilly Pastoral Co Pty Ltd and Others (1978) 19 ALR 519 ***(refd)***

CI Holdings Bhd v. Jabatan Pemegang Harta [1991] 1 CLJ 109; [1992] 2 CLJ (Rep) 218 HC ***(refd)***

Farrar v. Farrars Ltd (1888) 40 ChD 395 ***(refd)***

Hong Leong Bank Bhd v. Staghorn Sdn Bhd and Other Appeals [2008] 2 CLJ 121 HC ***(refd)***

K Balasubramaniam (Likuidator bagi Kosmopolitan Credit & Leasing Sdn Bhd) v. MBF Finance Bhd & Ors [2005] 1 CLJ 793 FC ***(refd)***

Malayan Banking Bhd v. Lim Poh Ho & Anor [1997] 2 CLJ 516 CA ***(refd)***

Ngan & Ngan Holdings Sdn Bhd & Anor v. Central Mercantile Corp (M) Sdn Bhd [2010] 3 CLJ 818 CA ***(refd)***

Salomon v. Salomon & Co Ltd [1895-99] All ER Rep 33 ***(refd)***

The Ayer Molek Rubber Company Bhd v. Bintang-Bintang Sdn Bhd [2013] 4 CLJ 820 CA ***(foll)***

Tse Kwong Lam v. Wong Chit Sen [1983] 1 WLR 1349 ***(refd)***

Wong Wee Kheong & Anor v. Daya Bersama Sdn Bhd & Other Appeals [2013] 3 CLJ 969 FC ***(foll)***

Legislation referred to:

Companies Act 1965, ss. 218(1)(f), (i), 219(2), 223

For the applicant - Sakhty Vell Saminathan (Wan Koon Meng with him); M/s Azman Davidson & Co

For the respondent - Sivagurunathan; WY Chan & Roy

Reported by Lyana Shohaimay

JUDGMENT

Che Mohd Ruzima Ghazali JC:

Introduction

[1] This is the applicant's application dated 3 December 2013 for an order under s. 223 of the Companies Act 1965 for *inter alia* the following orders:

(i) That the applicant herein as Receiver and Manager ("R&M") of the respondent be granted leave to intervene in this proceedings and be made a party hereto;

(ii) That the following sale and purchase agreements ("SPA") and assignment agreement executed by the applicant as R&M and lawful attorney of the respondent for valuable consideration for the sale of the following assets of the respondent be declared valid:

(a) SPA dated 25 October 2013 with cam Plastic Industry Sdn Bhd in respect of an industrial lot with a factory and structures erected thereon and having an address at Lot No. 19971 Kanthan Industrial Estate, Kanthan, 31200 Chemor, Perak Darul Ridzuan ("the industrial lot") for RM3,467,000;

(b) SPA dated 2 October 2103 with Heng Mimi and Teh Seng Poh in respect of a terrace house known as No. 86 Jalan Naga Kanthan 4 Taman Sri Kanthan 31200 Chemor Perak Darul Ridzuan ("the terrace house") for RM70,000;

(c) SPA dated 30 August 2013 with Puan Khor Yew Huan in respect of an apartment known as Parcel E8 Level 4 Eugenia Block, Greenhill Resort 39000 Tanah Rata Cameron Highlands, Pahang Darul Makmur ("the apartment") for RM180,000;

(d) SPA dated 25 October 2013 with Cam Plastic Industry Sdn Bhd in respect of various machinery and fixtures and fittings of the respondent ("the machinery, fixtures and fittings") for RM764,000;

(e) Assignment Agreement dated 25 October 2013 with Cam Plastic Industry Sdn Bhd in respect of four trademarks of the respondent, ("the trademarks") for RM45,000.

(iii) That all steps taken by the applicant and all documents executed by the applicant for and on behalf of the respondent prior to the date of the order to be granted herein in respect of the disposal of the assets of the respondent pursuant to the terms of the said SPA and assignment agreement be declared valid;

(iv) That the applicant be empowered to take such further steps and execute such other relevant documents where necessary for and on behalf of the respondent in disposing of the assets of the respondent pursuant to the terms of the said SPA and assignment agreement;

[2] On 10 April 2014, the court allowed the applicant's application to intervene and allowed the validation orders. The grounds of the decisions are as follows.

Brief Background Facts

[3] Petitioners had filed a petition dated 24 August 2005 to wind up the respondent. Essentially the winding-up petition was filed on the following basis:

(a) That the directors of the respondent, have acted in the affairs of the company in their own interest rather than the interest of the members as a whole, or in any other manner whatsoever which appears to be unfair or unjust to the other members pursuant to s. 218(1)(f) of the Companies Act, 1965; and

(b) That the court is of the opinion that it is just and equitable that the company be wound up pursuant to s. 218(1)(i) of the Companies Act, 1965.

[4] One of the main issues in the winding-up petition concern the creation of 1.3 million overstated stocks in the respondent company sometime in or around the year 1995 without the knowledge of the petitioners.

[5] The winding-0up judge made a finding that the director in the respondent who was responsible for the creation of the RM1.3 million overstated stocks was Lee Chin Yen, a non-executive director of the respondent who is also the first petitioner's brother-in-law. Lee Chin Yen gave instructions to Chang Ah Seng, an executive director of the respondent to create the overstated stocks.

[6] On 18 October 2012, the court granted the winding-up order of the respondent on just and equitable ground and the Official Receiver was appointed as a liquidator.

[7] On 19 October 2012, the respondent filed a notice of appeal against the winding-up order and a notice of motion for a stay of the winding-up order pending the hearing and determination of its appeal to the Court of Appeal against the said order. On 29 October 2012, the respondent obtained an interim stay of the winding-up order pending the hearing and disposal of the respondent's notice of motion.

[8] On 5 November 2012, the petitioners filed a notice of motion for the appointment of Mr Ong Tee Chew as the private liquidator for the respondent. On 21 February 2013, the court allowed the petitioners' application to appoint a private liquidator and dismissed the respondent's notice of motion for a stay of the winding-up order.

[9] The respondent being dissatisfied with the said order, filed a notice of motion at Court of Appeal for a stay of the execution of the winding-up order on 12 March 2013. On 3 April 2013 the Court of Appeal allowed the respondent's notice of motion for a stay of execution of the winding-up order

pending the disposal of the appeal against the winding-up order dated 18 October 2012, which is currently pending.

[10] Besides that, the fact that prior to the winding-up order, Oriental Bank Berhad and now known as Hong Leong Bank Berhad ("HLBB") had on two occasions granted financing facility to the respondent and as security for the same, the respondent had granted in favour of HLBB a debenture dated 2 October 1995 ("first debenture") and another debenture dated 12 March 1998 ("second debenture") was not disputed.

[11] The debentures cover all fixed and floating assets and undertakings both present and future of the respondent, and also contain an irrevocable power of attorney clause pursuant to which the respondent has for valuable consideration appointed HLBB and/or its R&M to be the attorney of the respondent. The power of attorney clauses are in section 13.01 in the first debenture and section 11.01 in the second debenture. These debentures were duly registered in The High Court.

[12] The respondent had defaulted in its obligations to repay HLBB and HLBB had pursuant to the debentures appointed the applicant *vide* a deed of appointment dated 19 February 2013.

[13] By virtue of the power of attorney clause, the applicant's appointment as R&M for the respondent also entails his appointment as the lawful attorney for the respondent for valuable consideration.

The Application

Preliminary Point Of Law

[14] The petitioners had submitted that it was too late for the applicant to intervene. The applicant's application for leave to intervene in the winding-up proceedings for validation orders for the sale of the respondent's assets and for assignment of its trademarks pursuant to s. 223 of the Companies Act was filed after the winding-up proceedings have been concluded with the winding-up order being granted on 18 October 2012. Therefore there are no longer any winding-up proceedings before this court in existence for the applicant to intervene. (The Federal Court case of *Hong Leong Bank Bhd v. Staghorn Sdn Bhd and Other Appeals* [2008] 2 CLJ 121; [2008] 2 MLJ 622 was referred).

[15] The applicant replied by saying that the said grounds of objection is flawed both in fact and in law. Despite the winding-up order was granted on 18 October 2012, the winding-up has however been stayed pursuant to the order of the Court of Appeal dated 3 April 2013 with the effect that the status quo of the respondent was preserved. This was expressly admitted by the petitioners. The petitioners' own admission clearly contradicted and defeated the petitioners' grounds for preliminary objection.

[16] It was also submitted that in any event, whether or not the respondent has been wound up is irrelevant as the winding up proceeding had commenced against the respondent since the year of 2005. The application made was for the validation order made pursuant to s. 223 of the Companies Act 1965 which requires the disposition of the respondent's assets after winding up has commenced to be validated by the court.

[17] It was further submitted that even if the stay order is lifted and the respondent has been wound up, it will not affect the *locus* of the applicant as R&M to sell the respondent's assets (the Federal Court case of *K Balasubramaniam (Likuidator bagi Kosmopolitan Credit & Leasing Sdn Bhd) v. MBF Finance Bhd & Ors* [2005] 1 CLJ 793; [2005] 2 MLJ 201 was referred).

[18] As regard to the preliminary point of law raised by the petitioners, I am of the opinion that the application by the applicant to intervene does not intend to interfere with the winding up order. This application has nothing to do with the winding up order. The main purpose of the application is to apply for the validation order under s. 223 of the Companies Act. Even though there are no longer any winding-up proceedings before this court, it is my view that the applicant can still use the existing files to apply for the validation order for the disposition of the respondent's assets since it was related to the winding-up order given by this court.

[19] In the premise, in order to apply for the validation order, I find that it is proper for the applicant to apply for leave to intervene in the existing winding-up proceeding and therefore the objection on the preliminary point of law raised by the petitioners doesn't hold water and I dismiss it.

The Validation Order

[20] The petitioners had objected to the application of the validation order by the applicant on the following grounds:

(a) The applicant has knowledge regarding the winding-up proceedings;

(b) The bulk of the assets or properties are being sold to a company with common directors of the respondent; and

(c) The transaction in the present case is not a truly independent bargain and does not reflect the true market value of the respondent's assets.

[21] The petitioners had submitted that the sale and purchase agreements signed between the applicant and various purchasers in August and October 2013 which is well after the applicant became aware that the respondent has been wound up. Yet the applicant had failed to inform Mr Ong Tee Chew, the liquidator of the respondent regarding the sale of the respondent's assets. Since Mr Ong is a court appointed liquidator, he is also an officer of the court who must be kept informed.

[22] The applicant also failed to inform the petitioners regarding the proposed sale of the respondent's assets although the petitioners are the shareholders or contributories of the respondent company who would be affected by the said sale and may be liable to contribute to the debts owed by the respondent if the proceeds of sale by the applicant are insufficient to cover the debts owed under the debentures.

[23] The petitioners also submitted that the bulk of the assets or properties under the debentures are now being sold by the applicant to companies with common directors of the respondent. An industrial lot together with a factory and structures erected on it, various machineries, fixtures and fittings located at the factory and four trademarks of the respondent had being sold to Lee Chin Yen and Tan Hong Cheng who are the directors and shareholders of the respondent and are also the directors and shareholders of the companies called CAM Plastic Industry Sdn Bhd.

[24] CAM Plastic Industry Sdn Bhd is wholly owned by CAM Resources Berhad, a public listed company with Lee Chin Yen and Tan Hong Cheng being the directors and shareholders through their nominee companies. Therefore it is submitted that if validation orders are granted for the sale and purchase agreements entered between the applicant with cam Plastic Industry Sdn Bhd, the ultimate effect would be that the business of the respondent is effectively transferred to Lee Chin Yen and Tan Hong Cheng who are the directors and shareholders of cam Plastic Industry Sdn Bhd which is wholly owned by CAM Resources Berhad. Leaving behind an empty shell in the respondent and this will defeat the purpose of the winding-up order and the appointment of Mr Ong Tee Chew as the private liquidator of the respondent. As the private liquidator, Mr Ong has a duty to investigate the affairs of the respondent regarding the creation of the RM1.3 million overstated stocks by Lee Chin Yen and Chang Ah Seng to avoid paying income tax and to ensure that the directors are held accountable for their conduct.

[25] It is further submitted that the validation orders being sought in the present case is a back door way to defeat the winding-up order by transferring the assets, business and trademarks of the respondent to another company controlled by Lee Chin Yen and Tan Hong Cheng. It is not just and fair to allow the sale and purchase agreements in the present case to be validated since it is not *bona fide* and was done under suspicious circumstances (the Federal Court case of *Wong Wee Kheong & Anor v. Daya Bersama Sdn Bhd & Other Appeals* [2013] 3 CLJ 969 was referred).

[26] As regard to the transaction which is said not to be a truly independent bargain and does not reflect the true market value of the respondent's assets, the petitioner submitted that any transaction entered by the applicant to sell the assets or properties of the respondent must be a truly independent bargain. It had to be noted that the applicant did not deny that the bulk of the sales are to companies with common directors of the respondent. (The

cases of *Farrar v. Farrars Ltd* (1888) 40 Ch D 395; *Australian & New Zealand Banking Group Ltd v. Bangadilly Pastoral Co Pty Ltd and Others* (1978) 19 ALR 519; and *Tse Kwong Lam v. Wong Chit Sen* [1983] 1 WLR 1349 were referred). A

[27] As to the true market value, the petitioners submit that the applicant had not disclosed the number of offers he had received after the advertisement in the newspapers. The petitioners further submitted that the valuation report prepared by Jordan Lee & Jaafar dated 27 February 2013 with regards the industrial lot was defective on the reason that the said report did not show any evidence of the values of comparative properties ie, industrial land with factory and structures erected thereon. B C

[28] Finally the petitioners had submitted that the applicant has a duty to take reasonable care to obtain the true market value of the assets at the time of the sale although he is not obliged to sell the assets at the highest price and has a duty to make full and frank disclosure. (The case of *CI Holdings Bhd v. Jabatan Pemegang Harta* [1991] 1 CLJ 109; [1992] 2 CLJ (Rep) 218; [1992] 2 MLJ 251 was referred). D

[29] In contrast, the applicant had submitted that since the crux of the petitioners' challenge to the sale of the respondent's assets was essentially that the sale by the applicant is questionable and not *bona fide*, the petitioners are entitled under the relevant provisions of the Companies Act to seek recourse against the applicant upon completion of the sale, and the petitioners' current action in opposing the application herein is premature and should not be entertained. E

[30] In the event that the petitioners are allowed to challenge the sale by the applicant, the applicant had submitted that the sale of the respondent's assets by the applicant was *bona fide* and sold at open market value based on measures taken by the applicant before the sale. F

[31] After the applicant had taken over the affairs of the respondent to manage and realise its assets for HLBB as a secured creditor, the applicant proceeded with the necessary steps to sell the above assets by way of advertisement of "Offer for Sale" *via* public tender which involved obtaining of a valuation report, preparing of information memorandum, and placing of an "Offer for Sale" advertisement in the Star newspaper inviting the general public to make an offer to purchase. G H

[32] As for the valuation reports and the respective market value and force sale value as ascribed for the assets, it is submitted that the petitioners while alleging and disputing the valuation report, have not discharged their burden of proof thereof by producing another evidence of valuation report to counter the value given by the applicant and as such, their allegation of defective valuation should be disregarded in total. I

[33] The applicant also alleged that the petitioners had made a bare assertion when picking up issues on the valuation. It is submitted that the valuation given is merely a guide to the applicant and the valuation does not bind the applicant since the sale was put up in the open market. (The Court of Appeal's case of *Malayan Banking Bhd v. Lim Poh Ho & Anor* [1997] 2 CLJ 516; [1997] 1 MLJ 662 was referred).

[34] The applicant had received offers to purchase the respondent's assets after the newspaper advertisements. The applicant had then proceeded to accept the highest offer. The petitioners had made unfounded allegation that the number of offers received was not disclosed, and that the sales of the respondent's assets do not reflect the true market value. The applicant has not only taken all reasonable care to obtain the true market value of the respondent's assets at the time of the sale, but have conducted himself professionally throughout the sale of the respondent's assets with strict adherence to the due process and in customary practice followed in such "offer for sale" exercise.

[35] As regards to the respondent's assets namely the industrial lot, the machineries, fixtures and fittings, and the trademarks purportedly sold to CAM Plastic Industry Sdn Bhd which happens to have common shareholders with the respondent, it is submitted that the objection should be disregarded in total based on the doctrine of separate entities. (The cases of *Salomon v. Salomon & Co Ltd* [1895-9] All ER Rep 33 and *Ngan & Ngan Holdings Sdn Bhd & Anor v. Central Mercantile Corp (M) Sdn Bhd* [2010] 3 CLJ 818; [2010] 1 MLJ 822 were referred).

Decision

[36] The applicant's application for the validation order was made under s. 223 of the Companies Act 1965. For easy reference the provision of that section is as follows:

> 223. Avoidance of dispositions of property, etc
>
> Any disposition of the property of the company including things in action and any transfer of shares or alteration in the status of the members of the company made after the commencement of the winding up by the Court shall unless the Court otherwise orders be void.

[37] As to the meaning of 'commencement of winding-up', sub-s. 219(2) of the Companies Act 1965 provides that the winding-up shall be deemed to have commenced at the time of the presentation of the petition for the winding-up. The provisions of that section are as follows:

> 219. Commencement of winding up by the Court
>
> (1) Where before the presentation of the petition a resolution has been passed by the company for voluntary winding up, the winding up of the company shall be deemed to have commenced at the time of the

passing of the resolution, and, unless the Court on proof of fraud or mistake thinks fit otherwise to direct, all proceedings taken in the voluntary winding up shall be deemed to have been validly taken.

(2) In any other case the winding up shall be deemed to have commenced at the time of the presentation of the petition for the winding up.

[38] Besides that, the Court of Appeal in the case of *The Ayer Molek Rubber Company Bhd v. Bintang-Bintang Sdn Bhd* [2013] 4 CLJ 820 where Hamid Sultan JCA delivering the judgment of the court held at paras. 3 and 4 p. 825 as follow:

[3] One of the crucial section to determine in this appeal is s. 223 of the Companies Act 1965 ('CA 1965') and the scope of s. 243 of the CA 1965. The said sections read as follows:

223: Avoidance of dispositions of property, etc

Any disposition of the property of the company including things in action and any transfer of shares or alteration in the status of the members of the company made after the commencement of the winding up by the Court shall unless the Court otherwise orders be void.

243: Power to stay winding up

(1) At any time after an order for winding up has been made the Court may, on the application of the liquidator or of any creditor or contributory and on proof to the satisfaction of the Court that all proceedings in relation to the winding up ought to be stayed, make an order staying the proceedings either altogether or for a limited time on such terms and conditions as the Court thinks fit.

[4] **At the outset we must say that s. 243 of the CA 1965 itself does not prohibit the court while granting the stay to make any relevant orders which may be necessary and essential under s. 223 of the CA 1965.** And no authorities from respected jurisdiction were furnished to say otherwise. In addition on the factual matrix of the case s. 223 will not apply. (Emphasis added)

[39] Based on the provisions and the authorities cited above, I have no doubt that the applicant has all the right to apply to the court for the validation order to validate the sale of the respondent's assets and for the assignment of the trademarks regardless that there is a stay granted for the winding-up proceeding or not.

[40] Meanwhile, in deciding whether a validation order should be granted under s. 223 of the Companies Act 1965, I was reminded that there are two broad considerations to be considered as decided in the case of *Wong Wee Kheong & Anor v. Daya Bersama Sdn Bhd & Other Appeals* [2013] 3 CLJ 969 where the Right Honourable CJ (Malaya) Zulkefli Makinudin speaking for the Federal Court at pp. 981 and 982 had said that:

A [12] With respect we could not agree with the above contention of the respondent. It is true that ordinarily since the respondent company had been wound up on 24 August 2000, a disposition of the company's property after the commencement of the winding up, which was on 31 May 2000 (filing of the petition) would be void. *However based on the peculiar set of facts of the case, it is our considered view that the proviso in s. 223 of the Act is still operative in relation to the transactions which took place and the court has the power and jurisdiction to declare the transactions as valid.*

B

[13] **It is to be noted that s. 223 of the Act makes no mention as to time. It is our view validation can be made by the court at any time.** We C are in agreement with the submission of learned counsel for the appellants that to insist that the purchasers must have applied for a validation after the company was wound up, there must be knowledge. Here the purchasers had no knowledge at all of the winding up order at the material time. It is also noted that the Act does not prescribe as to how the discretion under s. 223 of the Act D is to be exercised. However there are case laws that have distilled the principles involved in validating transactions after the commencement of winding up, and even after a winding order has been granted based on two broad considerations:

i) if the transaction(s) is/are beneficial to the general body of E creditors; or

ii) if it was just and fair to allow the transaction(s) with particular regard to the good and honest intention of the persons concerned. (Emphasis added)

[41] Having been guided by the two broad considerations in mind, now I F will consider the merits of the application. The applicant as R&M appointed by the debenture holder has all the authorities to deal with the respondent's asset. Besides that, the applicant is also the holder of an irrevocable power of attorney granted by the respondent for valuable consideration and the said power of attorney survive and remain valid even though respondent had been G wound up. The Federal Court in the case of *K Balasubramaniam (Liquidator for Kosmopolitan Credit & Leasing Sdn Bhd) v. MBF Finance Bhd & Ors* [2005] 1 CLJ 793; [2005] 2 MLJ 201 Siti Norma Yaakob FCJ at para. 54, p. 225 had summarised the powers and duties of R&M and liquidator as follows:

[54] Following my interpretation of the relevant laws and their application H to the cases cited, I answer the six questions posed to us in the following manner:

(1)...

(i) Upon the winding-up of a company and the appointment of a liquidator, the Receiver and Manager ceases to be the agent of the I company but he continues to retain his possessory rights conferred upon him by the debenture to take custody and control of all the assets charged under the debenture.

(ii) Section 233 and/or s. 277 of the Act, read together with ss. 300 and 305 of the same Act and r. 66 of the Rules do not apply to a Receiver and Manager appointed pursuant to a power contained in a debenture and the Receiver and Manager is entitled to possession and control of the charged assets despite a demand made by the liquidator for their return, unless those assets are redeemed by the liquidator or there is a surplus of proceeds which has to be returned to the liquidator.

(iii) Following a winding-up, the Receiver and Manager loses his status as agent of the company. He continues to retain his possessory powers as a Receiver and Manager whilst the liquidator exercises his statutory powers and duties under the Act. There is no question of any superior ranking. They exist side by side with each exercising his separate powers and duties conferred on them by the Act in the case of the liquidator and by the debenture in the case of the Receiver and Manager. ...

As regard to the power of attorney, The Federal Court in para. 4 at the same page further observed that:

4. A winding-up order does not cancel a power of attorney nor does s 4 read together with s 300 and s 305 and the other provisions of the Act. Thus my answers to questions 1 to 3 would not be different if the debenture which provides for the appointment of a receiver and manager incorporates a power of attorney as well.

[42] It is clear that even though the applicant as R&M loses his status as agent of the respondent when the respondent was wound up but he continues to retain his possessory powers as conferred upon him by the debenture to take custody and control of all the respondent's assets charged under the debenture. The clear demarcation of powers and duties between the applicant under the debenture and the liquidator under the law enable the applicant exercising his separate powers to deal with respondent's assets. Therefore, it is my considered view that the applicant's dealings in disposing the respondent's assets to the highest bidder for each and every asset offered through public tender is well within the scope of applicant's powers and duties and validly done.

[43] As to the mode of dealings with the respondent's assets, the applicant affirmed that the necessary steps to sell the assets by way of advertisement of "Offer for Sale" *via* public tender. The steps include the effort of getting the valuation report, preparing of information memorandum, and placing of an "Offer for Sale" advertisement in the Star newspaper on 11 March 2013, 8, 12 and 19 April 2013 to invite the general public to make offer to purchase the assets. The applicant then proceeded to accept the highest bidder offer of various assets and finalise the dealing with purchasers of the assets by signing a sale and purchase agreement subject to the condition precedent that the sales thereof to be validated by way of validation order being obtained by the applicant from the court.

[44] I am of the opinion that with all step taken by the applicant shows that the applicant has acted in good faith and had done what was supposed to be done by a prudent R&M while dealing with the charged assets.

[45] As regard to the petitioners' submission on the market value and their objection on the method of valuation done by the valuer on the industrial lot, I agree with the applicant's counsel that the petitioners while alleging and disputing the valuation report, have not discharged their burden of proof thereof by producing another evidence of valuation to counter the value given by the applicant. Without the benefit of having another expert opinion, I don't have the option to evaluate the other opinion as to the value of those assets. There are various methods of valuation and what was tendered in court by the applicant is one of them. I cannot say that that valuation is defective unless it can be shown that the method used is totally wrong and against the basic principles of valuation. The petitioners failed to do so.

[46] I also agree that the opinion given by a valuer as regards to the valuation of the assets is merely a guide to the applicant and the valuation given does not bind the applicant since the sale was put up in the open market. The Court of Appeal's in the case of *Malayan Banking Bhd v. Lim Poh Ho & Anor* [1997] 2 CLJ 516; [1997] 1 MLJ 662 where Mahadev Shanker JCA, at p. 670 had said that:

> The true commercial value of a property is not what any valuer thinks it should be, but the actual price that property will fetch when it is put up for sale in the open market. …
>
> … Any finding to the contrary required positive evidence from the borrowers that the auction was fraudulently or so recklessly or negligently conducted that there were genuine buyers who would have come and bid to buy the property...

At p. 675 the court further observed that:

> As for proof of damage, it can never be enough for the mortgagor to make a bare assertion that the price was too low even if he calls a valuer to say so because the 'true market value' or the 'best price' of a property is not what the mortgagor or his valuer thinks it is, because this is evidence of opinion not fact. The highest price a real buyer was willing to pay in the circumstances has to be judicially determined on the basis of relevant evidence…

[47] Now, I come to the main objection of the petitioners. Some of the respondent's assets namely the industrial lot, the machineries, fixtures and fittings, and the trademarks was purportedly sold to CAM Plastic Industry Sdn Bhd which happens to have common shareholders with the respondent. CAM Plastic Industries Sdn Bhd is a wholly owned subsidiary of CAM Resources Berhad which is a public listed company. The petitioners alleged that the applicant dealing with the company controlled by Lee Chin Yen and Tan Hong Cheng is a back door dealing, not *bona fide* and was done under suspicious circumstances.

[48] On this issue I would like to look back to the role played by the applicant. I will not repeat myself; my observations and findings in paras. [42], [43] and [44] are also applicable here. Applicant is merely exercising his power and discharging his duty under the debenture and did not have any personal interest at all in the dealings. The method employed by the applicant for the sale of the assets by public tender defeats the petitioners' said contention. It was never alleged nor proven that there had been any private dealing between the applicant and CAM Plastic Industries Sdn Bhd or any of its directors.

[49] On this issue, it is also pertinent to note that the sale of the respondent's assets was done by the applicant, who is a R&M and not by the directors of the respondent. It is not a case where the seller company is represented by the director who is also the director of the purchasing company. Therefore the element of conflict of interest, improper bargain or bad faith alleged had never arisen. Those dealings done by applicant are in my view a truly independent bargain and all the case law referred to by the petitioners on this issue are easily distinguished.

[50] Finally, I would like to deal with the issue raised by the petitioners on the failure of the applicant to give any prior notice to Mr Ong Tee Chew, a court appointed liquidator for the respondent and the petitioners while acting as an agent of the debenture holder in entering into all the sale and purchase agreements to sell off the respondent's assets. The applicant argued that it is inconceivable for Mr Ong Tee Chew to be put in a position whereby he has to report in the future to the winding-up court, the creditors and the contributories of the respondent that all the assets and trademark of the respondent has been sold off without his knowledge because the applicant failed to inform him.

[51] With respect, I am of opinion that the applicant's failure to inform the liquidator as to the dealings is not fatal and cannot nullify those dealings. I agree that the applicant, as a matter of practise could have informed the liquidator prior to the dealings but I cannot find any legal requirement for the applicant to do so. The liquidator was not left without information, the offer for sale of the respondent's assets by public tender serve a good notice to the public including the liquidator. Furthermore, the current application even though was not served on the liquidator, was served on the respondent where the liquidator is its an agent under the law.

Conclusion

[52] Having the two broad principles in mind, I would also like to refer to the conclusion note in the applicant's submission as to continuous accumulation of interest and default interest. The amount of those interest are averaging more than RM40,000 per month (as confirmed by the applicant in para. 15.3 of the applicant's affidavit in reply), and it is argued that it is therefore prudent and imperative that the sale be concluded soonest possible. I agree

and I am of opinion that any attempts to delay the validation order to validate the dealings of the respondent's assets will not only deny the benefit to the general body of creditors but also cause the interest to accumulate and become detrimental to the respondent.

[53] In *Wong Wee Kheong*'s case it was held at paras. 14 and 15 at p. 982 as follows:

> [14] The general rule in s. 223 of the Act is that it does not shut out *bona fide* transactions. In *Lian Keow Sdn Bhd (In Liquidation) & Anor v. Overseas Credit Finance (M) Sdn Bhd & Ors* [1988] 2 MLJ 449, Seah, SCJ made reference to a passage by Vaisey J in *Re Steane's (Bournemouth) Ltd* which states:
>
> > ... that each case must be dealt with on its own facts and particular circumstances (special regard being had to the question of the good faith and honest intention of the persons concerned), and that the court is free to act according to the judge's opinion of what would be just and fair in each case.
>
> The discretion is an unfettered one.
>
> [15] In *Engtex Marketing Sdn Bhd v. Zinma Housing Development Sdn Bhd & Anor* [2009] 5 CLJ 759, the issue of whether disposition of the company's property after winding up without sanction of court arose. The court held that although s. 223 of the Act would invalidate such transfers, with regard to the *bona fide* purchaser, the provision would not apply when there is no allegation of misrepresentation or fraud or collusion against the purchaser or that the purchaser acted in concert with the persons in the company to effect the disposition despite being aware that that person had no authority to do so.

[54] Guided by the principles as laid down by the Federal Court above and for the reasons as adumbrated above, I allow the applicant's application for leave to intervene under prayer 1, validation order for the sale and purchase agreements and assignment agreement executed by the applicant with the purchasers under prayer 2 and the consequential order under prayer 3 and 4 of encl. 55 with no order as to costs.